UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: THE FREMONT-RIDEOUT HEALTH GROUP d/b/a FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL THE FREMONT-RIDEOUT HEALTH GROUP d/b/a FREMONT-RIDEOUT HOME HEALTH Employer, and CALIFORNIA NURSES ASSOCIATION, AFL-CIO Charging Party.	Case Nos. 20-CA-33521 20-CA-33649 20-CA-33801 20-CA-34017

REPLY BRIEF TO ANSWERING BRIEF OF THE EMPLOYER FILED ON BEHALF OF CHARGING PARTY CALIFORNIA NURSES ASSOCIATION

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I. PRELIMINARY STATEMENT

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, California Nurses Association, herein called "the Union " or "CNA", the Charging Party in the above-captioned proceeding, files this reply brief to the answering brief filed by The Fremont-Rideout Health Group, herein called "the Employer" or "Respondent," in this matter.

By separate motion filed this date pursuant to Section 102.47 of the Board's Rules and Regulations, the Union has requested the Board to strike certain portions of the answering brief filed by the Employer because those portions of the answering brief are not limited to the questions raised in the exceptions and in the brief in support of exceptions filed by either the Union or the General Counsel, as required under Section 102.46(d)(2) of the Board's Rules and Regulations. This reply brief addresses issues concerning portions of the answering brief that do comply with the requirements set forth in Section 102.46(d)(2) of the Board's Rules and Regulations

II. ARGUMENT

A. The Warnings Issued to Avalos and Clark Violated Section 8(a)(1) and (3) of the Act

In its answering brief (p. 54), the Employer acknowledges that the Board has held that where an employer disciplines employees based on union or protected activity, application of the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), is inappropriate, citing, *inter alia*, *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB 1110, 1120 (2007). The Employer also acknowledges that where an employee is disciplined for an alleged violation of a lawful rule while engaging in an activity protected by Section 7 of the Act, the employer is not privileged to act on a reasonable belief if, in fact, the employee is innocent of any wrongdoing, citing *Avondale Industries, Inc.*, 333 NLRB 622, 640 (2001).

However, the Employer asserts without supporting evidence that Heather Avalos and Tami Clark were "serial violators" of the Employer's policy on solicitation and distribution and adds that the Employer also disciplined Avalos and Clark based on "reports" the Employer claimed to have received that Avalos and Clark "had behaved in a threatening and intimidating manner." The Employer also asserts that the denial by Avalos and by Clark that they had engaged in such behavior "was insufficient to establish that Respondent's good faith belief in the validity of the reports that it received was unfounded."

Neither Avalos nor Clark was ever shown any "reports" concerning their alleged misbehavior. No witnesses were ever identified who supposedly observed any threatening or intimidating behavior. No specifics were ever provided as to what Avalos or Clark were alleged to have said or done which caused anyone to believe that they had engaged in threatening or intimidating behavior. When Director of Nursing Steve Frost gave Tami Clark the write-up which accompanied the verbal warning, Clark asked Frost if he really thought she had done this. Frost replied, "Well, it's not what you do, [it] is how people perceive you." (Tr. 142). Furthermore, neither Frost nor anyone else in management ever attempted to find out from Avalos or Clark their version of events before issuing the verbal warnings containing extraordinary accusations of misconduct to each of them.

Given the lack of any specifics, there was nothing more that Avalos or Clark could do to refute the contentions except to deny them. The Employer's unwillingness to ask Avalos or Clark for their version of events negates the Employer's contention that it was acting based on a good faith belief in the validity of the "reports" it had received. The comment made by Frost demonstrates that as far as the Employer was concerned, the truth was inconsequential.

Under these circumstances, the denials by Avalos and Clark that they had engaged in improper behavior were sufficient to establish that they were innocent of any wrongdoing. The Employer produced no evidence at any time that they had in fact acted improperly and the Employer's failure to fully investigate the matter before issuing the disciplinary warnings to Avalos and Clark, coupled with Frost's stated indifference to the truth of the matter, belies the claim that the Employer was acting in good faith. Therefore, the warnings issued to Avalos and Clark violated Section 8(a)(1) and (3) of the Act. *NLRB* v. *Burnup & Sims*, 379 U.S. 21 (1964); *Avondale Industries*, *supra*; *Keco Industries*, 306 NLRB 15, 17 (1992); *Palace Sports & Entertainment Inc. d/b/a St. Pete Times Forum f/k/a Tampa Bay Ice Palace*, 342 NLRB 578, fn. 4 and 586-588 (2004), enf. 411 F. 3d 212 (D.C. Cir. 2005).

B. The Board Should Find A Violation of Section 8(a)(1) of the Act Regarding The Statement Made by Supervisor Bezuidenhout to Employee Katherine Zubal

Both the General Counsel and the Union have filed exceptions to the Judge's failure to find that the Employer violated Section 8(a)(1) of the Act when Supervisor Karen Bezuidenhout told employee Katherine Zubal that she had heard from Supervisor Angelina De Arte that Zubal was talking to co-workers about the Union, and that she (Bezuidenhout) preferred Zubal to talk about the Union on her break. There is undisputed evidence that the Employer permitted employees to talk about non-work subjects during work time. Both the General Counsel and the Union argued in their respective briefs to the Judge that this statement constituted an imposition of a discriminatory no-talking rule. While the Judge rejected this argument and characterized it as an improper attempt by the General Counsel to amend the complaint after the hearing, the Union pointed out in its brief in support of exceptions that under the principles set forth by the Board in *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enf. 920 F. 2d 130 (2nd Cir.

1990), the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.

The Employer states that the Board's Rules require that the complaint contain a clear and concise statement of the acts which are claimed to constitute an unfair labor practice. There is no doubt that paragraph 7(a) of the complaint clearly described the act which was alleged to be unlawful, namely, the statement made by Karen Bezuidenhout "telling employees they were required to go to non-work areas during non-work times to discuss the Union." Bezuidenhout was not called to testify by the Employer and the testimony of Katherine Zubal was undisputed. Instead, the Employer called Supervisor Angelina De Arte in an unsuccessful attempt to show that Zubal had been engaged in solicitation. Thus, it is unclear how the Employer could be prejudiced by the contention made by the General Counsel and the Union that the statement made by Bezuidenhout constituted an imposition of a no-talking rule. Unlike in the cases cited by the Employer, this is not a situation in which improper motives were being attributed to the Employer without giving it an opportunity to defend itself, nor is it a situation in which the General Counsel's final authority to issue complaint has been compromised or challenged.

The only real effect of addressing the question of the lawfulness of the statement in the context of the actual evidence is that it removes the smoke screen the Employer has attempted to create. The Board's decision in *The Register-Guard*, *supra*, 351 NLRB at 1119, expressly recognizes the distinction between a no-solicitation rule on the one hand and a no-talking rule on the other. The Board found in that instance that an e-mail sent a May 4, 2000, was not a solicitation and that the Employer's imposition of restrictions related to solicitation was unlawful. The same analysis should apply here. The Employer cannot claim to be prejudiced by

the proper application of the law to the actual facts of the case. The Board is therefore urged to find that the Employer violated Section 8(a)(1) of the Act when Supervisor Karen Bezuidenhout told employee Katherine Zubal that she preferred Zubal to talk about the Union on her break.

C. The Board Should Find A Violation of Section 8(a)(1) of the Act From the Employer's Imposition of Access Restrictions On the Union

The Judge found that the Employer did not enforce the restrictions on access by non-employees in 2007 until after the Union increased its activity, including calling a one-day strike on August 31, 2007. The Judge concluded that this conduct by the Employer was not unlawful and both the General Counsel and the Union filed exceptions to this conclusion.

In answering the exceptions filed by the General Counsel and the Union, the Employer asserts that the Union has offered a new "theory" for finding a violation of the Act. Contrary to the Employer's contention, the Union has not advanced a new "theory." Rather, the Union has pointed out yet another uncontested fact, namely, that the restrictions on access imposed by the Employer in its memorandum to employees dated October 16, 2007 (G.C.X. 15) and in the letter dated October 19, 2007, from the Employer's attorney to the Union (G.C.X. 14) were not limited to solicitation or distribution as in the Employer's historical policy dating back to 1985 (R.X. 13) and the newly-stated restrictions applied only to the Union. As the Union pointed out in its brief in support of exceptions, the Board in *The Register-Guard, supra*, 351 NLRB 1118-1119, expressly acknowledged that access policies based on discriminatory exclusion violate Section 8(a)(1) of the Act.

As both the General Counsel and the Union have argued, the evidence warrants a finding that the Employer's access policy, as re-instituted following the Union's strike on August 31, 2007, was in response to union activity and was unlawfully motivated. The Board has expressly

held that a rule which might otherwise by valid can be found to be unlawful if it is instituted in response to union activity or is based on an anti-union motive. *The Register-Guard*, *supra*, 351 NLRB at 1118, fn. 18; *Wild Oats Markets, Inc.*, 344 NLRB 717, fn. 4 (2005); *Martin Luther Memorial Home, Inc., d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board is therefore urged to find that the Employer violated Section 8(a)(1) by its imposition of restrictions of access on the Union in response to Union activity.

D. The Employer's Interpretation of *The Register-Guard* Is Inconsistent With the Board's Decision

In its answering brief, the Employer mischaracterizes the position of the Union regarding the scope of the Board's decision in *The Register-Guard* and, more significantly, mischaracterizes the decision itself. Contrary to the Employer's contention, the Union did not argue that the decision in *The Register-Guard* represents a *sub silentio* reversal of more than 60 years of Board and Court law. In fact, the Union argued precisely the opposite position, namely, that the majority opinion in *The Register-Guard* only overruled *Fleming Co.*, 336 NLRB 192 (2001), enf. denied 349 F. 3d 968 (7th Cir. 2003) and *Guardian Industries*, 313 NLRB 1275 (1994), enf. denied 49F. 317 (7th Cir. 1995), both of which dealt with the employer's obligation to allow union literature to be posted on employee bulletin boards.

If the Employer were correct in its assertion that the same standards apply in cases involving traditional solicitation and distribution as in cases involving use of employer-owned property or equipment, there would be no reason for the Board to draw the distinctions that it did between property interests and managerial interests. *The Register-Guard*, *supra*, 351 NLRB at 1115. Likewise, if the Board had intended to overrule 60 years of Board and Court law regarding traditional solicitation and distribution, it would have named at least some of the cases it was overruling which dealt with this subject. Instead, the Board only mentioned *Fleming Co.*,

supra, and *Guardian Industries*, *supra*, as being overruled. Under these circumstances, the most reasonable interpretation is that the Board only intended to overrule these two cases and any similar cases dealing with the employer's obligation to make its property or its equipment available to employees for union activities if it allowed such property or equipment to be used for non-work purposes.

Accordingly, the Union submits, as stated previously in the brief in support of exceptions, that the Judge erred in his analysis and that the Board's decision in *The Register-Guard* does not preclude finding a violation of Section 8(a)(1) of the Act with respect to the statement made by Supervisor Karen Bezuidenhout to employee Katherine Zubal, the statement made by Supervisor Sue Chambers to employee Roxann Moritz, and the discriminatory access policy applied to the Union. Further, the Board's decision in *The Register-Guard* does not preclude finding a violation of Section 8(a)(1) and (3) of the Act based on the warnings given to employees Heather Avalos and Tami Clark because of their union activities.

III. CONCLUSION

For the reasons stated in this reply brief and in the Union's brief in support of exceptions the Union submits that the Administrative Law Judge has erred with respect to the findings of fact, the conclusions of law, the remedy, the recommended Order, and the Notice to Employees in the manner specified in the exceptions filed by the Union. The Board is therefore urged to modify the findings of fact, the conclusions of law, the remedy, the recommended Order, and the

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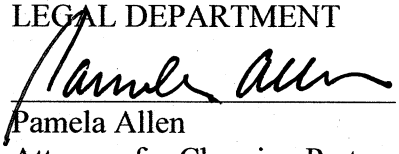
Notice to Employees in accordance with the exceptions filed by the Union, and to issue a remedial Order that will provide a full and complete remedy for the Employer's unfair labor practices.

DATED: May 1, 2009

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION
LEGAL DEPARTMENT



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PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Suite 300, Oakland, California 94612.

On the date below, I served a true copy of the following document:

REPLY BRIEF TO ANSWERING BRIEF OF THE EMPLOYER FILED ON BEHALF OF CHARGING PARTY CALIFORNIA NURSES ASSOCIATION

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: May 1, 2009

Rob Craven

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